

Decision **DRAFT DECISION OF ALJ KOTZ** (Mailed 10/19/2001)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking for purposes of revising General Order 96-A regarding informal filings at the Commission.

Rulemaking 98-07-038
(Filed July 23, 1998)

**SECOND INTERIM OPINION ADOPTING CERTAIN REQUIREMENTS
FOR NOTIFYING TELECOMMUNICATIONS CUSTOMERS
OF PROPOSED TRANSFER, WITHDRAWAL OF SERVICE,
OR HIGHER RATES OR CHARGES**

1. Summary

In today's decision, we adopt another part of the previously proposed revisions to General Order (GO) 96-A, which comprehensively governs utility tariffs (including their content, form, publication, and means by which they are amended).¹ The rule revisions adopted today (which will eventually be codified in GO 96-B) are set forth in the Appendix; they concern the notice that a telecommunications utility must provide its affected customers when that utility proposes a rate increase, a withdrawal of service, or certain kinds of transfers. These rule revisions complement our efforts in Rulemaking (R.) 00-02-004 to develop consumer protection rules and procedures applicable to all telecommunications utilities.

¹ In a prior interim opinion (Decision (D.) 01-07-026) in this rulemaking, we adopted rules governing (1) use of the Internet to publish tariffs, and (2) representations by a utility regarding any of that utility's tariffed services.

We intend to adopt and implement these rules revisions now, without waiting for adoption of GO 96-B as a whole. As with our prior interim opinion (see footnote 1), we believe adoption of these rules revisions will benefit consumers, and should not be delayed. The notice requirements adopted today will also work in tandem with the final rules in R.00-02-004; we expect to be considering the latter rules shortly.²

2. Adopted Notice Requirements

The notice requirements adopted in today's decision derive in substance from General Rule 4.2, Telecommunications Industry Rules 3-3.3, and related definitions in the assigned Administrative Law Judge's Draft Decision (ALJ Draft) issued on February 14, 2001. Parties have had four opportunities to comment on the ALJ Draft, and we have modified the notice requirements in response to some of the comments.

Briefly, the notice requirements specify how, when, and in what circumstances a telecommunications utility (i.e., a public utility that is a telephone corporation under the Public Utilities Code) must give prior notice to those customers who would be affected by a change the utility intends to make. Specifically, a utility must give prior notice whenever the utility proposes to (1) transfer part or all of its customer base to another telecommunications service provider, (2) withdraw a service, or (3) raise rates or charges or impose more restrictive terms or conditions. The utility must give this notice on (or before) the earlier of a date that is at least 25 days before the requested effective date of the

² Until we take final action on GO 96-B, the notice requirements adopted today will be treated as an Appendix to GO 96-A, as we did with the rules adopted in D.01-07-026. Both sets of interim rules will be published at the Commission's Internet site together with the rest of GO 96-A.

advice letter proposing the change, or the date when the utility submits the advice letter to the Telecommunications Division.³

A utility may give notice by one or a combination of means. These include bill inserts, notices printed on bills, separate notices sent by first-class mail, and e-mail to those customers who receive bills from the utility by e-mail.

We have made non-substantive modifications to the notice requirements as set forth in the ALJ Draft so that they are complete in a stand-alone format. We have also made two substantive changes. The ALJ Draft does not expressly authorize e-mail notice; both utility and consumer commenters noted that many customers now receive their bills by e-mail, and these commenters suggest that e-mail notice is appropriate for such customers. We agree, and we have clarified the notice requirements accordingly.

We also agree with comments that the ALJ Draft's requirement for notice of a proposed transfer is overbroad.⁴ Not all transfers subject to our approval likely would affect the transferring utility's customers. The notice requirement we adopt today covers only those transfers that would have the effect of replacing the transferor with another service provider. In addition, a transfer that would have the effect of withdrawing or reducing service or raising rates would have to be noticed to affected customers under the provisions governing withdrawals of service and rate increases.

³ In effect, submission of the advice letter will be the triggering event for notice purposes under current procedures. If and when GO 96-B is adopted as proposed in the ALJ Draft, utilities will have authority to implement some kinds of changes immediately upon submission of the advice letter. In that circumstance, a utility exercising that authority would have to notify its affected customers 25 days in advance of submitting its advice letter.

⁴ See, e.g., Pac-West Telecomm, Inc., Opening Comments, pp. 13-14.

3. Response to Comments on the ALJ Draft

As noted above, we have received four rounds of comments since issuing the February 14 ALJ Draft. Opening Comments and Reply Comments on the entire ALJ Draft were filed on March 23 and April 6, 2001, respectively. In addition, the ALJ provided two opportunities for comment focusing on specific aspects of the Telecommunications Industry Rules. First, in comments due June 14 (later rescheduled to June 29), parties were requested to identify any existing telecommunications advice letter procedure that would change under the General Rules or Telecommunications Industry Rules, and (where applicable) to indicate why they prefer the existing procedure. Second, in comments due July 16, parties could make policy arguments regarding the Telecommunications Division's authority to suspend Tier 2 advice letters. We here respond to these comments to the extent they concern the notice requirements we are adopting.

Consumer advocates generally support the adopted notice requirements. For example, our Office of Ratepayer Advocates (ORA) agrees that customers should have advance notice of rate increases. (ORA, June 29 Comments, p. 5.) The Utility Reform Network (TURN) also agrees, noting that the notice requirements "will better enable customers to make informed choices, thereby enhancing the ability of telecommunications markets to function as envisioned in economic theory." (TURN, Reply Comments, p. 5.)

TURN and ORA oppose a provision in General Rule 4.2 in the ALJ Draft. Under that provision, a utility could satisfy a customer notice requirement by publishing notice in a newspaper of general circulation, but only if newspaper publication were authorized by the appropriate Industry Rules. The Telecommunications Industry Rules do not authorize newspaper publication for this purpose, nor do the notice requirements we adopt today.

However, in another respect, we liberalize the notice requirements in the ALJ Draft, as suggested by both TURN and the California Telecommunications Coalition (Telco Coalition).⁵ Specifically, we will permit customer notice by e-mail to customers who receive their bills via e-mail.

In addition to customer notice by e-mail, Telco Coalition (Opening Comments, p. 14) supports notice by newspaper publication. ORA (as we already mentioned) opposes newspaper notice, particularly if the utility does not use any other means to notify its customers of a given advice letter. In response, we note that the extent to which a utility may rely on newspaper publication for customer notice is still under consideration for the final order in this proceeding. In the ALJ Draft, the Energy and Telecommunications Industry Rules do not exercise the power conferred by General Rule 4.2 to allow customer notice through newspapers; only the Water Industry Rules allow such notice, and then only in limited circumstances. Undoubtedly, a notice via bill, bill insert, or direct mailing from the utility to its customers is much more likely to get the affected customers' attention than is an advertisement in a newspaper, especially if the advertisement is tucked away in the newspaper's "legal notices" section. Consequently, we are not convinced at this time to authorize any general reliance

⁵ Telco Coalition is a group of "competitive" companies (as distinguished from "incumbent" local exchange companies). Regarding its Opening and Reply Comments on the ALJ Draft, the group consisted of AT&T Communications of California, Inc., California Cable Television Association, The California Association of Competitive Telecommunications Companies, ICG Telecom Group, Inc., WorldCom, Inc., Cox California Telcom, LLC, XO California, Inc., and Time Warner Telecom of California, LP. The composition of Telco Coalition shifted slightly for its June 29 Comments, in that Pac-West Telecomm, Inc. joined in those comments, while ICG filed separate comments. For purposes of our response to the various comments, the shift seems immaterial.

by telecommunications utilities on newspaper publication to satisfy customer notice requirements.

Verizon California Inc. and Verizon Select Services Inc. (collectively, Verizon), Citizens Telecommunications Company and various affiliates (collectively, Citizens), and Telco Coalition criticize various other aspects of the notice requirements as set forth in the ALJ Draft. We will address these criticisms in the above sequence.

Verizon objects to the notice requirements in principle. It believes, “Competitive market forces will adequately ensure that all carriers, on their own initiative, provide appropriate customer notice of service changes and other service-related information. . . . Commission-mandated notice requirements [are] unnecessary.” (Verizon, Opening Comments, p. 19.) Accordingly, Verizon urges that we retain our current procedures wherever they provide for no customer notice or a shorter notice period, as compared to the notice requirements in the ALJ Draft. (See Verizon, June 29 Comments, p. 3.) In reply, TURN strongly supports the new notice requirements, citing “the sordid recent history of telecommunications industry marketing abuses and failure to provide customers with accurate information on rates, terms, and conditions of service. . . .” (TURN, Reply Comments, p. 8.)

We are convinced that prior notice to customers is necessary and appropriate in the circumstances covered by the requirements we adopt today. Our experience in many complaint proceedings and investigations conducted since we last took a broad look at customer notice requirements in the telecommunications industry shows that inadequate information, misinformation, and customer confusion in this industry are far too prevalent. Prior notice to customers will not hamper legitimate competition; in fact, our

new notice requirements will help ensure that customers get what they want and like what they get.

Verizon, among other parties, notes that we currently allow “minor” rate increases (5% or less) by non-dominant telecommunications carriers to become effective without prior notice to customers. (Verizon, Opening Comments, p. 13.) We now consider this minor/major distinction to be untenable. Figuring out whether an increase is or is not “minor” has often proved controversial. More important, the question of the significance of a particular rate increase is properly one for the customer to decide, not for the utility or the regulator. Depending on a given customer’s choice of services and calling patterns, a small increase could have a major impact. Consequently, our notice requirement does not distinguish between major and minor rate increases.

Verizon (Opening Comments, p. 18) objects to our treatment of “customer base” as an asset for purposes of notice to affected customers of a proposed transfer. Verizon notes that the phrase “customer base” is not used in the Public Utilities Code sections (§§ 851-854) addressing transfers of assets or control, or in Rules 35 and 36 of our Rules of Practice and Procedure (concerning applications for approval of such transfers). However, as Pac-West notes (Opening Comments, p. 13), Public Utilities Code Section 2889.3 and the rules we adopted in our “slamming” rulemaking and investigation (R.97-08-001/I.97-08-002) have different notice requirements for transfers of customers than for other kinds of transfers. The notice requirement we adopt today to protect customers affected by proposed transfers complements Section 2889.3 and our slamming rules. It is also timely, considering the many withdrawals of telecommunications service we are observing.

Citizens suggests a uniform 30-day prior notice requirement in preference to the alternate provisions in the adopted rule. (Citizens, Opening Comments,

pp. 3-4.) Verizon apparently agrees with this suggestion in the event we reject Verizon's primary recommendation and instead require prior notice to customers. (Verizon, Opening Comments, p. 19.)

We reject Citizens' suggestion and adopt the notice rule as proposed in the ALJ Draft. The adopted rule better accommodates the planned structure of GO 96-B, which allows certain kinds of changes to become effective immediately upon filing of the advice letter. In such instances, and in general, we anticipate that utilities will want to use bill inserts (in preference to special mailings) to give prior notice; the minimum 25-day advance notice provision gives utilities with customers on different billing cycles more leeway to avoid special mailings, while ensuring all customers have adequate time to consider the impact of pending service changes.

Telco Coalition (June 29 Comments, pp. 12-14, 39-41) objects to the notice requirements as they pertain to higher rates or more restrictive conditions. Telco Coalition notes that the notice requirements modify those set in D.90-08-032 (for interexchange carriers) and D.95-07-054 (for competitive local carriers). D.90-08-032 requires prior customer notice of rate increases, but allows the notice to occur by bill insert following the advice letter filing of the increased rate, as long as the notice precedes the effective date of the increase. D.95-07-054 has similar notice provisions, but (as discussed earlier) it distinguishes between "major" and "minor" rate increases; for the latter, no prior notice to customers is required.⁶

⁶ A "minor" rate increase is one which is both "less than 1% of the [carrier's] total California intrastate revenues and less than 5% of the affected service's rates" when viewed cumulatively with other "rate increases that took effect during the preceding 12-month period" for that service. (D.95-07-054, Appendix A, Rule 3.C.) Another

Footnote continued on next page

Telco Coalition prefers the existing notice requirements to those we adopt today. Telco Coalition claims the new requirements force interexchange carriers to signal rate increases well in advance of submitting their advice letters, to the detriment of competition. Moreover, per Telco Coalition, specific details of a change to a rate or condition are often not finalized until just before the new tariff is submitted. Requiring customer notice to occur well before tariff submittal is impractical because last-minute changes are common in competitive industries; thus, the notices could become inaccurate and confusing, and the costliness to carriers of the notice process would increase. Finally, regarding minor rate increases, Telco Coalition says they “are presumed to impact customers less,” and particular customers may in fact see no overall increase if a tariff change raises one element of a service’s rate but reduces another element.

Telco Coalition asks for a hearing before the Commission changes the notice requirements of D.90-08-032 or D.95-07-054. Telco Coalition contends that the existing requirements adequately protect customers, that the new requirements will not necessarily provide better protection, and that the negative impacts of the new requirements (in terms of increased costs, delays, and customer confusion) would outweigh any customer benefit.

We affirm that affected customers should receive prior notice of increased rates or charges (whether “major” or “minor”), or more restrictive terms or conditions, as prescribed in the rules adopted today. We will not hold a hearing

difference between the rules adopted today and those in D.95-07-054 is that the new rules require the notice to include the current rate being increased, while D.95-07-054 does not require such inclusion. Telco Coalition notes this difference but does not indicate whether it objects to the modifications to D.95-07-054 in this respect. Juxtaposing the current and increased rates makes the notice more meaningful, so we think the modification is appropriate.

as requested by Telco Coalition; we find there are no disputed facts that are material to our decision to adopt these rules, as we explain below.

Fundamentally, we consider prior notice of rate increases to affected customers to be even more important than prior notice to regulators, especially considering the generally relaxed regulatory scrutiny of rates in the telecommunications market. Unfortunately, the existing notice requirements set in D.90-08-032 and D.95-07-054 get this relationship backwards. Advice letters submitted to the Commission provide it, and the utility's competitors, 30 days' notice of rate increases, while the days of prior notice to affected customers depend fortuitously on the utility's billing cycle.⁷ Providing affected customers assurance that they will receive reasonable prior notice of rate increases is one of the primary purposes of the rules adopted today.

Granting Telco Coalition's assertion that the new notice requirements will entail some increased costs, we think those costs are appropriate to better inform customers. We also concede the new requirements may affect competition, but only because they help competition function as we intend. Stated differently, the competitive advantage to be derived from surprising one's customers with rate increases is not an advantage we want to protect.

In adopting the new notice requirements, we act in our quasi-legislative capacity through a process of notice-and-comment rulemaking. We acted in the same capacity, using the same process, in D.90-08-032 and D.95-07-054. Those decisions, like today's, were not preceded by evidentiary hearings. In both of

⁷ Except for "minor" increases under D.95-07-054, for which the Commission gets five days' advance notice, while affected customers get no advance notice at all. We have already explained our rejection of the major/minor distinction. (See our earlier response to Verizon's comments.)

those decisions, we emphasized that conditions in the telecommunications market were changing rapidly; in that context, we stated, regarding interexchange competition, that we intended to “foster competition while still providing consumer safeguards.” (D.90-08-032, 37 CPUC2d 130, 154 “Policy Considerations.”) In announcing our “Initial Rules for Local Exchange Service Competition in California” (emphasis added), we set a “public policy principle and objective” to create an environment in which “telecommunications users shall receive adequate ongoing disclosure of the rates, terms and conditions of service and shall benefit from a clear and comprehensive set of consumer protection rules.” (D.95-07-054, 60 CPUC2d 611, 640, Appendix A, Rule 1.B.) Today’s decision is fully consistent with these policies.

To sum up, our existing notice requirements were expressly the product of policy judgments made near the start of competition in the local and long-distance markets. We made clear that we intended to revise those judgments, as might be appropriate, based on our observation of those markets.⁸ In modifying D.90-08-032 and D.95-07-054 regarding prior notice of rate increases to affected customers, we move in the direction of putting more (and more timely) information, and consequently more control, in the hands of consumers. That is what competition is all about.

4. Status of GO 96-B

This Commission remains committed to completing the work on GO 96-B, which will be a total revision and updating of the procedures for tariff filing and

⁸ E.g., “It is the policy of the Commission to monitor, on a periodic basis, the market conditions of the local exchange telecommunications market and reevaluate its policies on local exchange competition accordingly.” (D.95-07-054, 60 CPUC2d at 641, Appendix A, Rule 1.J.)

advice letter review. The last major hurdle is the Telecommunications Industry Rules, on which we have received four rounds of comments since issuing the ALJ Draft last February. In a nutshell, those Industry Rules pull together a vast number of procedures developed serially by the Commission (but not reflected in GO 96-A) as competition in the telecommunications industry expanded since the mid-1980s. In many cases, GO 96-B would simply codify those procedures, but in many other cases, the procedures would be modified.

The record shows that some of the proposed modifications are controversial, and that some confusion exists over which existing procedures would, in fact, be modified. At a minimum, we will need to clarify some of the Telecommunications Industry Rules, and may need to make related clarifications to some of the General Rules.⁹

In a project of this size, and an industry as divergent as telecommunications, we cannot realistically hope to achieve total consensus. Some honest differences in principle are likely to persist. Nevertheless, those differences that exist because of misunderstandings should be resolved. To that end, we expect to make several substantial changes to the ALJ's February 2001 version of GO 96-B, drawing on the four rounds of comments that version elicited. Our changes will be subject to a further comment cycle before final adoption, and the implementation schedule for GO 96-B will be adjusted as appropriate.

⁹ In considering the need for these clarifications, we have been greatly assisted by comments submitted on June 29, 2001, by various parties in response to an ALJ request for rule-by-rule analysis of the proposed telecommunications procedures. At a time when all parties' resources are stretched, we acknowledge and appreciate their efforts.

5. Comments on “Second Interim Opinion”

Today’s decision, the Second Interim Opinion in this proceeding, was mailed as a draft decision to the parties on _____, 2001. Concurrent opening comments were due on _____, and concurrent reply comments were due on _____. Because parties already have had the opportunity to comment on the substance of the notice requirements set forth in the draft decision, they were directed not to repeat their prior comments but instead to limit their comments to the changes made to the notice requirements as compared to the version in the ALJ Draft.

Findings of Fact

1. It is timely and appropriate to adopt requirements for notice by a telecommunications utility to its affected customers of a proposal by the utility to make certain kinds of changes. Changes for which such prior notice is appropriate include: a transfer in which another telecommunications service provider would replace the transferring utility for part or all of the transferor’s customer base; a withdrawal of service; and a higher rate or charge or more restrictive term or condition. Prior notice to customers will promote fairness and efficiency in the competitive market for telecommunications services.

2. For purposes of the rules adopted today, it is appropriate to allow utilities to give notice by one or a combination of means, including by e-mail to those customers who receive their bills by e-mail.

3. For purposes of the rules adopted today, customer notice by newspaper publication is inadequate.

4. Today’s decision should take effect immediately so that telecommunications utilities can begin implementing the customer notice requirements as soon as possible.

Conclusions of Law

1. The Commission should ensure that affected customers receive notice of certain kinds of proposed changes to their telecommunications service.
2. The Commission should adopt the rules set forth in the Appendix to today's decision.
3. There are no disputed facts that are material to our consideration of the notice requirements adopted in today's decision; consequently, we need not hold an evidentiary hearing before adopting those notice requirements.

SECOND INTERIM ORDER

IT IS ORDERED that:

1. The rules set forth in the Appendix to this Second Interim Opinion are adopted.
2. The rules set forth in the Appendix shall apply to all advice letters whose proposed effective date is at least 60 days after the effective date of this Second Interim Opinion.
3. This proceeding remains open to deliberate upon final adoption of General Order 96-B, apart from those rules adopted today and in Decision 01-07-026.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX

1. Applicability

As used in the following rules, “utility” means a public utility that is a telephone corporation, as defined in the California Public Utilities Code.

2. Definitions

As used in the following rules, (1) “transfer” means a transfer in which another telecommunications service provider would replace the transferring utility for part or all of the transferor’s customer base, and (2) “withdrawal of service” means discontinuing a service’s availability to all customers, including those customers receiving the service as of the date it is withdrawn. Unless otherwise required by context, use of the singular includes the plural.

3. Means of Giving Customer Notice

A utility may satisfy a notice requirement in these rules by one or a combination of the following means: bill inserts; notices printed on bills; or separate notices sent by first-class mail (or by e-mail to a customer who receives bills from the utility by e-mail).

4. Notice to Affected Customers

A utility must notify each affected customer of the utility’s advice letter requesting approval of (1) a transfer, (2) a withdrawal of service, or (3) higher rates or charges or more restrictive terms or conditions. The utility must give this notice on the earlier of a date that is at least 25 days before the requested effective date of the advice letter, or the date when the utility submits the advice letter to the Telecommunications Division’s Advice Letter Coordinator.

If the utility requests approval of a transfer, the notice must identify the new service provider, describe the changes (if any) in rates, charges, terms, or conditions of service, and state that customers have the right to select a new service provider.

If the utility requests approval of a withdrawal of service, the notice must describe the proposed withdrawal. If the service to be withdrawn is basic service

(as specified in Part 4 of Appendix B of Decision 96-10-066 and as modified from time to time by the Commission), the notice must also describe the arrangements the utility has made to ensure continuity of service to affected customers. If the utility resells basic service, the notice must state that customers may choose another service provider or (if no other service provider is chosen) receive basic service from the underlying carrier or carrier of last resort.

If the utility requests approval of higher rates or charges or more restrictive terms or conditions, the notice must describe the current and proposed rates, charges, terms, or conditions (as appropriate). If the utility is a local exchange carrier regulated through periodic general rate cases, the notice must also describe the reason for the proposed change to a rate or charge and state the impact of the change in dollar and percentage terms.

(END OF APPENDIX)